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No. 97-1171

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

In re the Marriage of MARY K.
and JAMES M. ODDINO

MARY K. ODDINO
Petitioner,

v.

JAMES M. ODDINO
Respondent;
HUGHES NON-BARGAINING RETIREMENT PLAN,
Respondent;

On Petition for a Writ of Certiorari to the California Supreme Court

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PETITIONER'S REPLY BRIEF

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QUESTIONS Presented

1. Does the opinion that an alternate payee who seeks to have her domestic relations order found qualified and enforced against a pension plan may only sue under the civil enforcement procedures for beneficiaries and participants at 29 U.S.C. §1132.

a) violate the statutory denial of beneficiary status to such alternate payees at §1056(d)(3)(J),

b) ignore the availability of all State law relating to Qualified Domestic Relations Orders ("QDROs") at §1144(b)(7), and

c) thwart the intent of Congress to rely on "State law providing for [QDRO] rights and payments", to apply "State court procedures" for the "enforcement of [QDROs]", and to assure that "the domestic relations court is the appropriate forum to ... settle all controversies"?

2. Is the opinion that 29 U.S.C. §1056(d)(3)(E)(i)(II) prohibits QDRO formulas for determining benefits from referencing an early retirement benefit invalid, and does it frustrate the intent of Congress that

a) a QDRO may order "all ... of the benefits payable with respect to a participant under a plan" per subparagraph (B)(i)(I),

b) a QDRO may express the amount to pay in any legible manner per subparagraph (C)(ii),

c) a QDRO provides access to early retirement benefits per subparagraph (E)(i)(I), and

d) any benefits paid early must be treated as accrued benefits, protected from any denial per §1054(g)(2)?

3. Does permitting payments under a QDRO without the segregated amount it ordered per 29 U.S.C. §1056(d)(3)(H) obstruct the intent of Congress that a QDRO may order payments retroactive to 18 months?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITIONER'S REPLY BRIEF 1
I. DISCUSSION 1
A. THE PETITION IS ACCURATE, AND THE ALLEGED ERRORS ARE UNSUPPORTED, IRRELEVANT AND WRONG 2
B. ERISA IS NECESSARY AND SUFFICIENT TO SETTLE THE QUESTIONS PRESENTED, TERMS OF THE PLAN ARE NOT IN THE CASE. 2
1. The California Supreme Court Wrongly Decided the Amount a QDRO May Order by Misreading ERISA, Not the Plan 2
2. Since REA, ERISA Treats Plan Early Retirement Benefits as Accrued Benefits 4
3. No Plan's Early Retirement Benefit Can Be a Subsidy since It Is Actuarially Increased To Find the Normal Retirement Benefit ("NRB") of ERISA, the Excess of Which NRB Is a Subsidy 5
C. SUBSIDIARY FEDERAL QUESTIONS AND THE QUESTIONS PRESENTED WARRANT REVIEW, BUT THE PLAN TERMS DO NOT 6
II. CONCLUSION 8

TABLE OF AUTHORITIES

1. CASES

In re Marriage of Oddino (1996) 48 Cal.App.4th 965, reversed (1997) 16 Cal.4th 67 ("Oddino I") 3

In re Marriage of Oddino (1997) 16 Cal.4th 67 ("Oddino II") 1, 2, 3, 4, 5, 8

Massachusetts Mut. Life Ins. v. Russell (1985) 473 U.S. 134,141 [105 S.Ct. 3085] 4

Mead Corp. v. Tilley (1989) 490 U.S. 714 8

2. STATUTES

ERISA

29 U.S.C. §1002(3) "plan" 6

29 U.S.C. §1002(5) "employer" 6

29 U.S.C. §1002(23) "accrued benefit" 4, 5

29 U.S.C. §1054(c)[Employee's accrued benefits derived from employer and employee contributions](3) 4, 5

29 U.S.C. §1104[Fiduciary duties](a) Prudent man standard of care (1) 1

29 U.S.C. §1132 Civil enforcement i

REA

29 U.S.C. §1054(g)[Decrease of accrued benefits through amendment of plan](2) ..... i, 5, 8

29 U.S.C. §1056(d)(3)(B)(i)(I) i

29 U.S.C. §1056(d)(3)(C)(ii) ..... i, 3

29 U.S.C. §1056(d)(3)(D)(ii) 3

29 U.S.C. §1056(d)(3)(E)(i)(I) i

29 U.S.C. §1056(d)(3)(E)(i)(II) ..... i, 3, 4, 8

29 U.S.C. §1056(d)(3)(H) i

29 U.S.C. §1056(d)(3)(J) i

§1144(b)[Construction and application](7) i

Treasury Regulations

26 C.F.R. §1.411(a)-7(a) Accrued benefit 5, 6

26 C.F.R. §1.411(a)-7(c)Normal retirement benefit 6

PETITIONER'S REPLY BRIEF

I. DISCUSSION

MARY K ODDINO (GLASSMAN), (hereinafter "Petitioner" or "MARY") respectfully replies to the Brief in Opposition ("Response") the Respondent Claimant Hughes Aircraft Non-Bargaining Retirement Plan ("Claimant" or "Plan") filed February 12, 1998.

The Response wants this Court not to consider multiple misinterpretations of ERISA by *In re Marriage of Oddino* (1997) 16 Cal.4th 67 ("*Oddino II*"). At page 12, the Petition lists ten of these errors. They led California to wrong statutory conclusions adversely affecting thousands upon thousands of participants and beneficiaries in all ERISA-qualified, defined benefit pension plans. These individuals are actual and potential alternate payee pensioners who now face the loss of their benefits, plus their employee ex-spouses who may now be forced to retire early to meet their marital obligations.[1]

This Plan has over 70,000 participants and beneficiaries. It is but one of 46,000 defined benefit plans, covering abut 33 million workers in the United States. With divorce rates of 40% nation-wide, 13 million ex-spouses alone could be eligible for Qualified Domestic Relations Order ("QDRO") benefits from the accounts of a like number of workers. Both spouses, perhaps totaling 26 million participants and beneficiaries, need access to their assets held in pension plans. Those assets are a primary source of liquidity to settle marital rights and obligations, and to provide day to day living expenses for non-employee ex-spouses otherwise incapable of self-support.

MARY herself has struggled for a decade to receive her share of benefits wrongfully withheld from her: $130

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[1] "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". §1104(a)(1).

thousand in 1988 dollars. Under *Oddino II* today, the average alternate payee will lose about $6,000 per year for life. This class of vulnerable payees, predominantly female senior citizens with no significant earning capacity, lobby, or legal support group, numbers about 13 million. Their collective loss is about $78 billion annually.

A. The Petition Is Accurate, and the Alleged Errors Are Unsupported, Irrelevant and Wrong

Without support, Claimant alleges errors in Petition footnotes and MARY's statement of the case.[2] These attempts to impeach the Petition number nineteen. A full answer to these charges is beyond the scope of any Reply Brief. However, they concern tangential Plan provisions or irrelevant procedural background. Moreover, Claimant's charges are contradicted by both the record and the terms of its own Plan. Each subject statement is immediately supported at exact sites in the record.

B. ERISA Is Necessary and Sufficient To Settle the Questions Presented, Terms of the Plan Are Not in the Case.

The Response seeks to divert focus from the critical federal Questions Presented. Except for the alleged impeachment, Plan interpretation does not lie in this case.

1. The California Supreme Court Wrongly Decided the Amount a QDRO May Order by Misreading ERISA, Not the Plan

Oddino II reversed accurate framing of the issue:

> The Hughes Plan interpreted the QDRO by using the age 65 vested retirement benefit[3] which provided

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[2]The known imperfections in the Petition can be repaired with the following. Errata: References to 26 U.S.C. §1056 and 26 U.S.C. §1132 should read 29 U.S.C. The error occurs three times on page i; once in the Table of Authorities, page v; and once on page 2. The date of the signature on page 17 should read 1998.

[3]At Response p. 10, ¶1, Claimant denies using the vested benefit, and alleges the Petition errs to so state. In truth Claimant proves the fact at

> wife with monthly payments of $1,563.70[4]; use of the early retirement benefit of Rule of 75 would have provided her with monthly payments of $3,689.60 calculated commencing from April 1, 1988, plus any cost-of-living adjustments. The Hughes Plan ultimately commenced payment of wife's share of the benefits on March 1, 1990.
>
> We hold that the trial court erred in denying the order to show cause. The Rule of 75 early retirement was not a subsidy, the QDRO thus did not improperly require payment greater than the actuarial equivalent of the permissible retirement benefits, and the Rule of 75 benefit was an accrued benefit to which wife was entitled pursuant to the QDRO and ERISA. Emphasis added, *In re Marriage of Oddino* (1996) 48 Cal.App.4th 965, 969. ("*Oddino I*")

Oddino II first ignored MARY's request that her order be read as a fixed dollar amount (for $3,689.60) per 29 U.S.C. §1056(d)(3)(C)(ii)[5], compliance with which request would have resolved any §1056(d)(3)(E)(i)(II) controversy and rendered moot whether the benefit paid under the Rule of 75 is a subsidy, or even an employer subsidy. The facts in this case did not involve the maximum liability of the plan to pay under a QDRO. (Plan maximum liability is the participant's normal retirement benefit.) Instead, the dispute was the amount ordered paid to MARY. The California Supreme Court held

> [D]oes an order qualify as a QDRO if it requires the retirement plan to pay the nonemployee spouse a portion of the employee spouse's early retirement

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Clerk's Transcript, Vol. II, page 225.

[4]This sum is 36.6231% (the subject QDRO share) of $4,269.71. This understated liability of the Plan is still more than sufficient to pay MARY $3,689.60 without causing any prohibited cost increase. 29 U.S.C. §1056(d)(3)(D)(ii).

[5]Henceforth unless otherwise stated, all statutory citations are to Title 29, Labor, of the United States Code (29 U.S.C.).

> benefits without any actuarial reduction, where the employee spouse is eligible for such unreduced benefits upon early retirement but has not yet retired? We answer this question no: Such unreduced early retirement benefits include an employer subsidy for early retirement, which, under section 1056(d)(3)(E)(i)(II), may not be paid pursuant to a QDRO if the employee spouse has not separated from service. Emphasis added, *Oddino II* at 71.

From a false starting position, the California Supreme Court continued to misconstrue ERISA to find a QDRO could not order an amount expressed as a share of a particular benefit. Its reasoning does not rely on any peculiarity of plan terms. Rather by importing wrongly read definitions from ERISA into the Plan, *Oddino II* rewrites the intent of Congress.[6]

2. Since REA, ERISA Treats Plan Early Retirement Benefits as Accrued Benefits

Another wrong reason *Oddino II* created was to find an early benefit was not an accrued benefit. This rested on the residue of a blue pencil edit[7] of the statutory definition of accrued benefit. The residue is:

> A participant's "accrued benefit" is defined as an annual benefit commencing at normal retirement age, or as the "actuarial equivalent" of such a benefit. (§§1002(23), 1054(c)(3).) *Id.* at 83.

The origin of this edit is a mark-up of statutes as follows:

> [A participant's] ~~The term~~ "accrued benefit" [is defined as] ~~means [¶] (A) in the case of a defined benefit plan, the individual's accrued benefit~~

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[6]The intent was to open the marital purse of earned pension benefits to settle all domestic disputes. The Petition, Appendix G.

[7]"This 'blue pencil' method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory language subsists. *Massachusetts Mut. Life Ins. v. Russell* (1985) 473 U.S. 134,141 [105 S.Ct. 3085].

~~determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of~~ an annual benefit commencing at normal retirement age .... (§1002(23)) [or as] ~~For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, ... the employee's accrued benefit, ... shall be~~ the ["]actuarial equivalent["] of such a benefit .... §1054(c)(3)

This write-out of the meaning §1002(23) is impermissible statutory construction. It is also contradicted by the implementing Treasury Regulation, 26 C.F.R. §1.411(a)-7(a) Accrued benefit. The California Supreme Court has found that the early retirement benefit ("ERB") is not an accrued benefit, impliedly because it provides payment early. That ruling applies to all ERBs in any plan that defines its ERB as a benefit beginning before normal retirement age. Furthermore, it ignored that ERISA requires both early retirement benefits and subsidies for early retirement be treated as accrued benefits.[8] §1054(g)(2).

3. No Plan's Early Retirement Benefit Can Be a Subsidy since It Is Actuarially Increased To Find the Normal Retirement Benefit ("NRB") of ERISA, the Excess of Which NRB Is a Subsidy

A further wrong reason *Oddino II* created was to find an early benefit a subsidy.[9] It said:

> Mary, like the Court of Appeal, relies on another paragraph of the Treasury regulation as supporting her position. Paragraph (c)(2)(ii) provides that if the early retirement annuity is not payable in the same "form" as the annuity payable on retirement at normal retirement

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[8] §1054(g)(2) applies to plan amendments, but since ERISA plans must be administered according to their terms, Petitioner asserts a plan may not act in a manner not permitted by amendment.

[9] "A subsidy [is] 'the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit.'" *Oddino II* at 83.

> age, the former must be converted to the same "form of annuity benefit" as the latter before determining which of the two is greater and therefore which is the normal retirement benefit. (26 C.F.R. §1.411(a)-7(c)(2)(ii) (1996).) Contrary to the position of Mary and the Court of Appeal, that paragraph does not require any actuarial increase in the early retirement benefit to account for its hypothetical deferral to normal retirement age; a difference in commencement time of annuity payments is not a difference in the form of annuity. *Id.*, p. 86, fn. 11.

Ignored is that elsewhere in ERISA commencement time governs whether an actuarial increase is required, for accrued benefits, for example per §1.411(a)-7(a), *supra.* The opinion overlooks that actuarial increases account for the time value of money[10]. The opinion supplies no criteria for making the deferral to normal retirement age (usually age 65), which the statute demands, and so renders that code meaningless. Hence, the opinion concludes the Rule of 75 benefit is more valuable than the normal retirement benefit (which it severely undervalued), and so the former must contain not only a subsidy, but by a California proclamation, an "employer subsidy"[11].

C. Subsidiary Federal Questions and the Questions Presented Warrant Review, but the Plan Terms Do Not

These few examples of errors in the court of last resort in California are subsidiary questions encompassed in the Petition Questions Presented. By themselves, they are sufficient, substantial questions of interpretation of federal law to warrant review. They are not reached in the minimized, incomplete questions the Response proposes.

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[10] Along with mortality statistics.

[11] The California Supreme Court refused to apply the statutory definitions of *plan* (§1002(3)) and *employer* (§1002(5)) to distinguish between the excluded "employer subsidy" and any offering under the terms of a plan. That Court simply declared that the subsidy it found in the Rule of 75 benefit was an employer subsidy.

Moreover, the terms of the Plan cannot supplant ERISA since "The Plan is a qualified pension plan which is intended to comply with ... the Employee Retirement Income Security Act of 1974" and "to comply with the requirements of ... the Retirement Equity Act of 1984". Plan, p. 1. That is not to say any conflict lies between ERISA and the Plan, but only between ERISA and Claimant's unsupported characterizations of the Plan it administers. The California Supreme Court erred with respect to ERISA well before it applied its conclusions to the subject Plan benefits. These issues will all be clear in the briefs on the merits.

The Response also argues that none of the three original Questions Presented warrants review. Claimant proposes substantive defenses which validate that each of MARY's Questions Presented is worthy of review. Claimant's position is that review is not warranted since it would prevail, which begs the Question of course. Yet, by refusing Review, the Court would decide the Questions against all MARYs.

II. CONCLUSION

This Court can not only correct the erroneous pension and jurisdiction conclusions *Oddino II* imports nationally, but also clarify the confusion that even a scrupulous pension plan creates in ignorance of the express intent of Congress in the Legislative History and codification of ERISA/REA. As Chief Justice Rehnquist has recently observed,

> If one examines the current offerings of the University of Virginia Law School, ... one sees that there are at least three courses offered just on the First Amendment to the United States Constitution. By contrast, there seems to be no course offering devoted to federal regulation of employer-employee benefit and retirement plans - an area of the law which is much less glamorous, receives much less media attention, but the ramifications of which have a far greater effect an the daily lives of people than do the nuances of First Amendment law. Surely practitioners are much more likely to have clients with pension and benefit plan problems than with separation of church and state problems. Keynote Address, Dedication of David A. Harrison III Law Grounds, UVA, November 8, 1997.

In the published opinions below, this Court is presented with opposite conclusions from readings of ERISA regarding QDRO amount and retroactivity. The Circuit Courts are also divided even as to whether an early retirement benefit is an accrued benefit.[12] MARY's will also be the first case for this

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[12]For the cases, see the Petition, page 4, footnote 6. Claimant relied on the finding of three Circuit Courts that pre-REA, unearned ERBs were not accrued benefits, but subsidies. This was for its proposition that an earned ERB, post-REA was still not an accrued benefit. The California Supreme Court wrongly agreed. That ERBs and subsidies alike be treated as accrued benefits at §1054(g)(2) is a REA enactment. Claimant now argues that §1054(g)(2) "is not implicated" (Response, p. 23), to assert it may act in a manner prohibited by amendment. It further now inserts into the universal meaning of "earned" the additional element of actual retirement. Response, p. 8, ¶2. See for example, *Mead Corp. v. Tilley*

Court to explain the exception to ERISA supersedure provided for state law related to QDROs, and in the intended context of the exception—pension benefits. This Court can now write the forward, the text, or at least several chapters for the course so sorely needed on federal regulation of retirement plans.

Therefore Petitioner respectfully prays this Honorable Court grant her Petition for writ of certiorari, settle the Questions Presented, and begin instruction on the federal regulation of retirement plans and benefits.

DATED: March 2, 1998

Respectfully submitted,

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(1989) 490 U.S. 714, 719 ("Plan participants who completed ten years of service attained a vested right to accrued benefits, that is, those benefits earned under the Plan.") Emphasis added. Claimant also ignores that ERISA prohibits it from using any provision in the Plan requiring actual retirement, if it existed, to determine a domestic relations order not a QDRO. §1056(d)(3)(E)(i)(II).